Supreme Court, U.S.
FILED
SEP 8 1992
OFFICE OF THE CLERK

No. 91-794

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HENRY HARPER, *et al.*,
Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF AMICI CURIAE THE VIRGINIA MANUFACTURERS ASSOCIATION, THE VIRGINIA CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/VIRGINIA, VIRGINIA RETAIL MERCHANTS ASSOCIATION, AND THE RETAIL MERCHANTS ASSOCIATION OF GREATER RICHMOND IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THIS COURT HAS LONG DEMONSTRATED A FUNDAMENTAL COMMITMENT TO ASSURING STABILITY AND PREDICTABILITY IN THE LAW, AND TO PROVIDING PARTIES WITH AN OPPORTUNITY TO BE HEARD ON ISSUES THAT AFFECT THEIR INTERESTS	4
A. Stability And Predictability In The Law	4
B. The Opportunity To Be Heard	6
II. RETROACTIVE APPLICATION OF *DAVIS*, WITHOUT CONSIDERATION OF THE FACTORS REQUIRED BY *CHEVRON OIL*, WOULD BE A WHOLESALE DEPARTURE FROM STABILITY AND THE OPPORTUNITY TO BE HEARD	8
A. It Would Be Fundamentally Unfair To Hold That *Davis* Applied Its Rule To The Parties In That Case	8
B. In Any Event, The *Beam* Rule Should Not Be Applied To Cases Decided Before *Beam*	10
III. WHEN THE MERITS OF THE RETROACTIVITY QUESTION ARE ADDRESSED, IT IS CLEAR THAT *DAVIS* SHOULD NOT BE APPLIED RETROACTIVELY	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Allied-Signal, Inc. v. Director, Division of Taxation, 112 S. Ct. 2251 (1992) 6, 7
American Trucking Associations, Inc. v. Smith, 496 U.S. 167 (1990) 5, 10, 15
Arant v. Lane, 245 U.S. 166 (1917) 11
Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) 14, 15
Ashland Oil, Inc. v. Caryl, 110 S. Ct. 3202 (1990) .. 10
Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864) 7
Barker v. Kansas, 112 S. Ct. 1619 (1992) 12
Boddie v. Connecticut, 401 U.S. 371 (1971) 5
Buckley v. Valeo, 424 U.S. 1 (1976) 14
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) ..... *passim*
Cipriano v. City of Houma, 395 U.S. 701 (1969) 5
City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702 (1978) 14
County of Orange v. Air California, 799 F.2d 535 (9th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) 9
Cross v. Burke, 146 U.S. 82 (1892) 11
Davis v. Michigan Department of the Treasury, 489 U.S. 803 (1989) ..... *passim*
Fuentes v. Shevin, 407 U.S. 67 (1972) 6
Harper v. Virginia Department of Taxation, 401 S.E.2d 868 (Va. 1991) 14
James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) ..... *passim*
Lemon v. Kurtzman, 411 U.S. 192 (1973) 13, 14
Louisville Trust Co. v. Knott, 191 U.S. 225 (1903) .. 11
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 14
Payne v. Tennessee, 111 S. Ct. 2597 (1991) 5
Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992) 5
R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) 7
Snow v. United States, 118 U.S. 346 (1886) 11
Swanson v. Powers, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992) 12

TABLE OF AUTHORITIES—Continued

Page

United States v. Byrum, 408 U.S. 125 (1972) 5
United States v. More, 7 U.S. (3 Cranch) 159 (1805) 11
United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 10, 11
Webster v. Fall, 266 U.S. 507 (1925) 10

OTHER AUTHORITIES:

Hellerstein, *Preliminary Reflections on McKesson and American Trucking Associations*, 48 Tax Notes 325 (July 16, 1990) 14
Reid, *An Overview of an Input-Output Modeling System: Personal Computer Version of IMPLAN* (May 1992) 15
Richardson, *Federal Taxation of States*, 19 Stetson L. Rev. 411 (1990) 12
U.S. Dep't of Labor, Bureau of Labor Statistics, *Supplement to Employment & Earnings* (Aug. 1992) 14
Virginia Employment Commission, *Labor Market Review* 14, 15

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INTERESTS OF THE AMICI CURAIE

Amici are five business and trade associations representing virtually the full spectrum of companies doing business in the Commonwealth of Virginia. These companies include both profit and not-for-profit corporations, state utilities, manufacturers, retailers, and defense contractors; and they run the gamut from new, fledging operations to large, well-established corporations. Together, the interests represented by these Amici account for the bulk of Virginia's gross domestic product.

The Virginia Manufacturers Association is a non-profit corporation representing 565 firms and has the goal of encouraging and supporting Virginia industries, and initiating and promoting constructive policies and activities on behalf of those industries. The Virginia Chamber of Commerce is a state-wide general business alliance of approximately 2000 members, which provides a voice for the general business community in promoting a healthy and prosperous economic climate. The National Federation of Independent Business/Virginia ("NFIB/Virginia") is the Commonwealth's largest small-business advocacy organization, with approximately 11,000 members that together employ well over 175,000 workers. NFIB/Virginia promotes the consensus view of small and independent business owners by supporting legislative and regulatory positions approved by majority vote of its members. The Virginia Retail Merchants Association is a broad-based trade group organized to lobby before the Virginia General Assembly, to educate its members and their customers in support of reasonable and proper laws for protection against trade abuses, and to foster understanding of retailing, free trade, and the free enterprise system. The Retail Merchants Association of Greater Richmond is a trade association with approximately 1500 members, serving the city of Richmond and the counties of Henrico, Hanover and Chesterfield. The Association provides educational services and advocates legislative and regulatory policies on behalf of its members.

Though the firms represented by Amici come from all over the Commonwealth and have highly diverse interests, they have one thing in common: a commitment to the economic health of Virginia and to the citizenry that depends upon that health. This commitment causes these Amici to care deeply about two fundamental principles of this Court: (1) stability and predictability in the law and the protection of economic reliance interests that develop around that law; and (2) an opportunity for

parties such as Amici to be heard by this Court before such reliance interests will be retroactively undermined.

It is clear to Amici that the result sought by the petitioners in this case threatens both of these fundamental principles. It is also clear that this result—the retroactive refund of nearly $500 million—would have a devastating impact on Virginia's economy, and consequently on Amici, for it would require significant reductions in vital state services, increases in taxes, or both, in a State already hard hit by the current recession.

Furthermore, the implications of such a result extend far byond this case. For if significant, retroactive refunds can be ordered here—where they would undermine substantial, good-faith reliance interests and where the prior understanding of the law was wholly justified and almost universally accepted—then refunds could be ordered in any case. Obviously, the constant threat of such retroactive liabilities would severely disrupt the climate for future investment in Virginia and in every other State.

Amici believe such a result would be economically disastrous, completely unfair to businesses, consumers and taxpayers alike, and directly contrary to the principles of this Court. They therefore file this brief strongly urging the Court not to reach this result.[1]

SUMMARY OF ARGUMENT

Acceptance of petitioners' arguments in this case would compromise two principles that lie at the bedrock of this Court's jurisprudence—stability in the law and the opportunity to be heard. Petitioners in this case have urged the Court to abandon the well-settled principles set forth

[1] This brief *amici curiae* is being filed with the consent of the parties, whose written statements of consent have been filed with the Clerk of the Court.

in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and impose enormous retroactive liability on twenty-three States, simply because a single party made a single concession in a brief filed several years ago with this Court in *Davis v. Michigan Department of the Treasury*, 489 U.S. 803 (1989). And petitioners would furthermore have the Court do so pursuant to the complete reformulation of retroactivity analysis announced in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991)—notwithstanding that *Davis* was briefed, argued, and decided before promulgation of the *Beam* rule. Because such a result does violence both to stability and to the opportunity to be heard, the Court should not accept it. Instead, the Court should apply the fairness and stability standards recognized in *Chevron Oil* and on that basis find *Davis* non-retroactive.

ARGUMENT

I. THIS COURT HAS LONG DEMONSTRATED A FUNDAMENTAL COMMITMENT TO ASSURING STABILITY AND PREDICTABILITY IN THE LAW AND TO PROVIDING PARTIES WITH AN OPPORTUNITY TO BE HEARD ON ISSUES THAT AFFECT THEIR INTERESTS.

This case implicates two fundamental principles of law: first, that legal rules should provide a stable and predictable backdrop against which individuals and businesses may order their affairs; and second, that parties should have an opportunity to be heard on issues that affect their vital interests, particularly where a court is considering retroactively reversing legal rules those parties long and reasonably relied on. Both these principles would be fatally compromised if this Court orders full retroactive refunds in this case.

A. Stability And Predictability In The Law.

The stability and predictability of the legal rules around which individuals plan their activities is a hallmark of

a civilized jursprudence. As Justice Harlan noted in *Boddie v. Connecticut*, 401 U.S. 371 (1971),

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.

Id. at 374.

This need for stability and predictability is most critical in the economic domain, with which Amici are vitally concerned. Indeed, "[t]he classic case for weighing reliance interests heavily . . . occurs in the commercial context, where advance planning of great precision is most obviously a necessity." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2809 (1992) (plurality opinion) (citation omitted); *see also Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991) (society's interest in settled law reaches its "acme in cases involving property and contract rights, where reliance interests are involved").

The Court has furthermore found the need for protection of reliance interests most acute in matters of tax planning and public finance.[2] As a result, the Court has insisted upon the most compelling circumstances before effecting a change in the law that would "defeat the reliance interest of those corporations which have structured their activities and paid their taxes based upon . . . well-established rules" and "disrupt settled expecta-

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[2] *See, e.g., American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 182-86 (1990) (plurality opinion); *United States v. Byrum*, 408 U.S. 125, 135 (1972) ("Courts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences"); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (per curiam) (refusing to apply invalidation of municipal bond issuance retroactively).

tions in an area of the law in which the demands of the national economy require stability." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 2251, 2262 (1992). Given the current status of the economy—particularly in Virginia—this principle has never been more important. A stable economy cannot be constructed on shifting legal sands.

Until this case, Amici regarded the primary safeguard of stability—or at least the bulwark against unfair, retroactive changes—to be *Chevron Oil*. There, the Court re-emphasized the need for careful individualized assessment of the reliance and equitable interests engendered by an old legal rule before any new rule may be applied retroactively. 404 U.S. at 106-09. The equitable principles recognized in *Chevron Oil*—which date back hundreds of years—represent the crucial mainstay against the substantial disruption that can be engendered by the retroactive application of newly-announced legal rules. Although Amici agree that these principles must be applied with a view toward balancing the interests of *all* affected parties, a court should surely not apply a new rule retroactively without *ever* performing that balancing.

Yet that is what petitioners seek here. They say that *Davis* may be applied retroactively without a careful weighing of the fairness and impact of the result. This Court could not accept that outcome without abandoning its commitment to stability in the law and protection of well-founded reliance interests.

B. The Opportunity To Be Heard.

Affording an opportunity to be heard to those parties whose rights and duties will be significantly affected by an adjudication is a *core tenet* of this Court's jurisprudence. Indeed, this principle is the very cornerstone of due process. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties

whose rights are to be affected are entitled to be heard. . . .'") (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864)).

Moreover, this principle applies to more than just the parties before the Court in a particular case. Rather, any decision, especially by this Court, necessarily has wide-ranging implications far beyond that particular case. Accordingly, before the Court contemplates altering the course of the law, it is essential that both "parties and amici ha[ve] the opportunity to apprise [the Court] of the impact of a change in the law." *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2551 (1992) (White, J., concurring).

This principle is particularly important where the retroactivity of a new rule is at issue, and particularly after this Court's decision in *James B. Beam Distilling Co. v. Georgia*, *supra*. For in that case, the Court announced for the first time that the question of retroactivity ordinarily will be decided *at the same time* as the substantive legal rule. But the Court also recognized that the retroactivity question necessarily involves consideration of "the equitable and reliance interests of parties absent but similarly situated." 111 S. Ct. at 2448. This recognition mandates that parties such as Amici—whose vital interests would be affected by a new legal rule—be given an opportunity to be heard on the question of retroactivity. And where retroactivity is at issue, this need for amici participation often is vital because resolution of the issue frequently depends on an evaluation of equities and interests that are unknown to the parties to the case.

For all these reasons, it is imperative that the opportunity to be heard be fully protected when retroactivity questions are at issue. Indeed, last Term, the Court plainly embraced this proposition when it contemplated establishing a new rule of law in *Allied-Signal*, *supra*, by calling for amicus curiae briefs specifically addressed to the question of retroactivity. *See* 112 S. Ct. at 2257. Yet

here, petitioners would have this Court conclude that the retroactivity of *Davis* has already been decided—without Amici or anyone else having addressed this issue. As further discussed below, the Court should not accept this result.

II. RETROACTIVE APPLICATION OF *DAVIS*, WITHOUT CONSIDERATION OF THE FACTORS REQUIRED BY *CHEVRON OIL*, WOULD BE A WHOLESALE DEPARTURE FROM STABILITY AND THE OPPORTUNITY TO BE HEARD.

Petitioners ask the Court to ignore completely the substantial economic disruption that would be caused by retroactive application of *Davis*, simply because the Court in *Davis* noted a single party's unilateral decision to provide a refund to a single claimant. Moreover, petitioners would have the Court do so under the wholly new standard announced in *Beam*, even though that case was decided after *Davis*. As will be shown, such a holding would be fundamentally unfair to Amici and the millions of other interested parties whose settled expectations would be seriously disrupted, where no party or amicus had reason to believe that it was required to argue the question of retroactivity in *Davis* itself.

A. It Would Be Fundamentally Unfair To Hold That *Davis* Applied Its Rule To The Parties In That Case.

It is clear that the retroactivity question was not decided in *Davis*, either explicitly or implicitly, and that the *Beam* rule therefore should not apply to this case. Indeed, Justice Souter's opinion in *Beam* reflects this Court's continued commitment to *stare decisis*—the principle that a matter, *once decided*, will not be continually revisited. Thus, under *Beam*, only when an opinion may be "fairly read" as having actually applied its rule retroactively to the parties before the Court should the rule be applied retroactively to other similarly situated litigants. 111 S. Ct. at 2445.

In *Davis*, however, the Court had no occasion to decide —and plainly did not decide—the question of retroactivity because the State of Michigan had already agreed to provide Mr. Davis with a refund should the Court invalidate its taxation scheme. This concession obviated any need to consider whether to apply the rule retroactively to the parties before the Court, and the Court's recognition of this fact certainly cannot be "fairly read" as having done so.

To hold otherwise, *i.e.*, to hold that Michigan's agreement to provide a small refund to a single taxpayer in a single case automatically renders twenty-two other States liable for over $2 billion in refunds, would greatly erode the principles of stability and opportunity to be heard. Indeed, such a holding would at one stroke both ignore *Chevron Oil*'s commitment to a careful *weighing* of the implications of retroactivity and also allow a question of enormous national consequence to be decided solely upon the stipulation of someone who did not even address the issue.[3]

These Amici submit that they, their employees and customers should not have their susceptibility to a crippling retroactive liability depend on the unilateral concession of a single party that was made four years ago. Plainly, *stare decisis* does not mandate such a result; on the contrary, that doctrine forbids preclusive effect in such situations. *See, e.g., County of Orange v. Air California*, 799 F.2d 535, 538-39 (9th Cir. 1986) (stipulation has no *stare decisis* effect), *cert. denied*, 480 U.S. 946 (1987).

Moreover, deciding retroactivity by default and *sub silentio* flies in the face of the Court's recognition that

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[3] *See* Brief for Appellees at 63-64, *Davis* (No. 87-1020) (conceding refund question but explicitly stating that "[e]ven assuming this remedy is appropriate for Appellant Davis, however, it is not necessarily appropriate for all others who may be similarly situated").

"the threshold determination whether a new decision should apply retroactively is a crucial one, *requiring a hard look at whether retroactive application would be unjust.*" *American Trucking Ass'ns v. Smith*, 496 U.S. at 181 (plurality opinion) (emphasis supplied). That determination plainly was not made in *Davis* and the Court should *now* take a "hard look" at the hardship and injustice that retroactive application would cause.

B. In Any Event, The *Beam* Rule Should Not Be Applied To Cases Decided Before *Beam*.

Even if *Davis* could be "fairly read" as having applied its rule to the parties in that case, *Beam* should not for that reason require retroactive application of *Davis* in this case. This is because *Beam* itself was not decided until after *Davis*.

Prior to *Beam*, when a case established a new rule of law and retroactivity was not raised by the parties or decided by the Court, other interested parties reasonably believed they would have an opportunity to argue the issue in a subsequent case. *See, e.g., Ashland Oil, Inc. v. Caryl*, 110 S. Ct. 3202 (1990) (deciding retroactivity in subsequent case); *Chevron Oil, supra* (same). *Davis* was precisely such a case, as retroactivity was neither decided by the Court, nor briefed or argued by the parties. Thus, no interested party, including Virginia and Amici, reasonably could have predicted that the Court would abandon its prior rule and consider the issue as having been decided.[4]

[4] *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (issue "not . . . raised in briefs or argument nor discussed in the opinion of the Court" is not *stare decisis*); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"). Indeed, it has long been held that even the Court's own exercise of jurisdiction—the validity of which the Court *must* address on its own—does not decide that question *sub silentio*. *See L.A. Tucker Truck Lines*, 344 U.S. at 38 (citing *Arant v. Lane*, 245 U.S. 166, 170 (1917), *Louisville Trust Co. v. Knott*, 191 U.S. 225, 236 (1903), *Cross v. Burke*, 146 U.S. 82, 87 (1892), *Snow v. United States*, 118 U.S. 346, 354 (1886), and *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805)).

Justice Souter's opinion in *Beam* altered this landscape significantly, by decreeing that retroactivity is implicitly decided whenever a rule is applied to the parties in a case, thereby requiring other interested parties to weigh in on retroactivity *at that time*. Because *Beam* itself upset settled expectations on which other interested parties, including Amici, relied, fundamental fairness requires that this new approach to retroactivity not *itself* be applied to foreclose a full consideration of the retroactivity issues in this case. Otherwise, parties such as Amici would be held retroactively to have waived their opportunity to be heard regarding the retroactivity of cases decided before *Beam*.

Obviously, Amici could not and did not waive an opportunity to be heard in *Davis* that they did not know, prior to *Beam*, needed to be preserved. And just as obviously, to hold that retroactivity was implicitly decided in *Davis* under the *Beam* rule—even though *Davis* was decided before *Beam*—would completely undermine this Court's commitment to ensuring both stability in the law and an opportunity for interested parties to address any proposed destabilization. As this Court held in *Chevron Oil*, it would be inequitable to hold that Virginia or any other affected party " 'slept on [its] rights' at a time when [it] could not have known the . . . limitation that the law imposed upon [it]." 404 U.S. at 108. For all these reasons, *Beam* should not apply to this case to foreclose an analysis of the retroactivity of *Davis* under *Chevron Oil* principles.

III. WHEN THE MERITS OF THE RETROACTIVITY QUESTION ARE ADDRESSED, IT IS CLEAR THAT *DAVIS* SHOULD NOT BE APPLIED RETROACTIVELY.

When the merits of the retroactivity question are addressed under *Chevron Oil*, it becomes apparent, as the Virginia Supreme Court held, that *Davis* should not be applied retroactively. Forcing a refund of nearly $500 million in already-expended tax revenues would have the clear consequence of unfairly and unnecessarily defeating the well-founded reliance interests of Virginia, its citizens, and companies (such as those represented by Amici) doing business in the Commonwealth.

First, it is beyond question that *Davis* was a "new principle of law" that "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106.[5] Indeed, prior to *Davis*, Michigan's exemption and those of twenty-two other States had gone unchallenged for decades, and it was far from clear even to a trained lawyer's eye that the tax was invalid. *See Davis*, 489 U.S. at 818-28 (Stevens, J., dissenting); *see also Barker v. Kansas*, 112 S. Ct. 1619, 1626 (1992) (Stevens & Thomas, JJ., concurring); Richardson, *Federal Taxation of States*, 19 Stetson L. Rev. 411, 435 (1990) (*Davis* was a "surprising" decision).

Especially in the arena of tax and commercial law, where the need for predictability is at its zenith, the public cannot be required to "foresee" the evolution of such esoteric legal doctrines as that at issue in *Davis*. For businesses such as those represented by Amici, which must

[5] As the Fourth Circuit recently concluded, the invalidity of such exemptions "was not clearly established" prior to *Davis*. *Swanson v. Powers*, 937 F.2d 965, 967 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992). Writing for the court, Judge Wilkinson held: "We decline to proclaim in hindsight after the *Davis* decision that the unconstitutionality of differential tax exemptions had been clear all along." *Id.* at 968.

plan their investments and activities years into the future, it is vitally important that the law not impose such unforeseen shocks upon the economy. Obviously, unplanned retroactive tax increases, imposed without the benefit of legislative consultation and deliberation, will decrease the funds available to businesses for investment and expansion. Similarly, retroactive application of *Davis* would have a serious chilling effect upon the States' abilities to meet their pressing needs for new revenue sources. Indeed, petitioners "would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fail." *Lemon v. Kurtzman*, 411 U.S. 192, 207 (1973).

Second, it is clear that non-retroactivity would not frustrate the purpose of the *Davis* rule. *See Chevron Oil*, 404 U.S. at 107. That purpose was entirely prophylactic: "to protect each sovereign's governmental operations from undue interference by the other." *Davis*, 489 U.S. at 814 (citations omitted). Prospective application fulfills this goal. In the wake of *Davis*, Virginia and other States promptly eliminated their disparate tax treatments. Because there is no evidence that any State adopted its scheme with the intent to harm the federal government, retroactive application of *Davis* would serve no legitimate punitive goals, and such liability is unnecessary to deter future violations. Moreover, as petitioners are no longer employed by the federal government, providing refunds would do nothing to protect any "governmental operations"—the sole purpose of *Davis*.

Third, retroactive application of *Davis* would impose devastating financial hardship on Virginia, its citizens, and all those who do business in the Commonwealth. This Court has repeatedly refused to apply a new rule retroactively when the social costs of doing so would be

too great.[6] Here, it is beyond question that "[t]he fiscal implications of *Davis* for the states are truly staggering." Hellerstein, *Preliminary Reflections on McKesson and American Trucking Associations*, 48 Tax Notes 325, 336 (July 16, 1990).

Because Virginia has more federal retirees than any other State, her refund exposure, recently estimated at $467 million, is the greatest of any State.[7] And "[t]his liability would come at a time when the Commonwealth is already struggling to meet enormous fiscal deficits." *Harper v. Virginia Dep't of Taxation*, 401 S.E.2d 868, 873 (Va. 1991). Compounding this problem is the fact that Virginia has been one of the States hardest hit by the current recession, and perhaps the slowest to climb out. During this recession, total nonagricultural employment fell by 5.3%, as compared with only 3.9% for the nation as a whole.[8] And because Virginia's economy is heavily dependent on defense spending—which continues to decline rapidly—its recovery will be significantly impeded. Thus, Virginia's ability to raise the required funds is severely hindered. As a plurality of this Court has noted, retroactive application of an unforeseeable change in tax law is unjust where "[a] refund . . . could deplete

[6] *See, e.g., Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1091-95 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982); *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702, 718-23 (1978); *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (per curiam); *Lemon*, 411 U.S. at 207-09 (1973).

[7] This figure is respondent's estimate of its potential refund liability through March 31, 1992.

[8] *See* Virginia Employment Comm'n, *Labor Market Review*, Vol. 4, No. 6, at 4 (June 1991) (Virginia employment as of June 1990); *id.*, Vol. 5, No. 5, at 5 (May 1992) (Virginia employment as of Feb. 1992); U.S. Dep't of Labor, Bureau of Labor Statistics, *Supplement to Employment & Earnings* 1 (Aug. 1992) (U.S. employment for same months).

the state treasury, thus threatening the State's current operations and future plans." *American Trucking Ass'ns v. Smith*, 496 U.S. at 182.

Moreover, the impact on Virginia's fiscal operations is only part of the story. Because the taxes which petitioners seek to have refunded have long since been spent on needed state services, Virginia would be force to increase taxes or drastically cut future services. Much of this liability would fall squarely on Amici's members, thereby affecting the entire economy. Indeed, it has been estimated that a $467 million individual tax increase in Virginia would cause the loss of $708 million to the economy as a whole and the loss of over 17,000 jobs, while a similar reduction in state services would cause the loss of $637 million and almost 14,000 jobs.[9] These losses are significant: a loss of 17,000 jobs would equal 35% of the 49,000 jobs lost in Virginia during 1990-91, one of the worst recession years in the recent history of the Commonwealth.[10] In the circumstances of this case, "[t]here is no justification for this Court . . . to impose this magnitude of burden retroactively on the public." *Norris*, 463 U.S. at 1107 (Powell, J., concurring and dissenting).

[9] The data on income and job loss were derived using the IMPLAN model, which is used regularly by the Virginia Employment Commission to forecast the effects of changes in public policy on the Virginia economy. *See* Reid, *An Overview of an Input-Output Modeling System: Personal Computer Version of IMPLAN* (May 1992) (available from Virginia Employment Commission); *id.* at App. D (listing previous studies). The data do not account for the potentially beneficial economic effects that could result from the expenditure of refund amounts in Virginia by recipients still residing there.

[10] *See* Virginia Employment Comm'n, *Labor Market Review*, Vol. 4, No. 6, at 4 (total nonagricultural employment as of Dec. 1990); *id.*, Vol. 5, No. 5 (May 1992) (total nonagricultural employment as of Dec. 1991).

CONCLUSION

The Court should not preclude itself—or these Amici—from addressing the *merits* of the retroactivity of *Davis*. When those merits are addressed, the pertinent equitable factors and the purposes of the *Davis* rule are best served by declining retroactive application.

Respectfully submitted,

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Dated: September 8, 1992